No. 17-312

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RENE SANCHEZ-GOMEZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOHN P. CRONAN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC J. FEIGIN
ALLON KEDEM
Assistants to the Solicitor General
DAVID B. GOODHAND
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in asserting authority to review respondents' interlocutory challenge to pretrial physical restraints and in ruling on that challenge notwithstanding its recognition that respondents' individual claims were moot.

PARTIES TO THE PROCEEDING

Petitioner, the United States of America, was the only appellee in the court of appeals. The four respondents—Rene Sanchez-Gomez, Moises Patricio-Guzman, Jasmin Isabel Morales (a.k.a. Jasmin Morales), and Mark William Ring—were appellants in the court of appeals.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 13
Argument:
The Ninth Circuit exceeded its authority by invalidating the security policy in this case 16
A. The Ninth Circuit lacked statutory authority for its decision 17
1. The district court's orders were not "final decisions" immediately appealable under 28 U.S.C. 1291 17
2. The Ninth Circuit did not have authority to issue a writ of "supervisory mandamus" 27
B. Respondents' claims had become moot before the Ninth Circuit adjudicated them 31
1. Respondents lost their personal interest in the outcome of the litigation when their criminal cases ended 31
2. Respondents' claims cannot be saved from mootness by construing their challenges as "functional class actions" 32
3. The exception to mootness for cases "capable of repetition, yet evading review" does not apply to respondents' claims 40
Conclusion 44

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 (1977) 20, 22
Bell v. *Wolfish*, 441 U.S. 520 (1979) 25, 29

Cases—Continued: Page

Berman v. *United States*, 302 U.S. 211 (1937) 19
Board of Sch. Comm'rs v. *Jacobs*,
420 U.S. 128 (1975) 37, 38
Campbell-Ewald Co. v. *Gomez*, 136 S. Ct. 663 (2016) 31
Cheney v. *United States Dist. Court*,
542 U.S. 367 (2004) 14, 15, 27, 28, 29, 30
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 40
Cobbledick v. *United States*, 309 U.S. 323 (1940) 18
Cohen v. *Beneficial Indus. Loan Corp.*,
337 U.S. 541 (1949) 19
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) ... 20, 21
County of Riverside v. *McLaughlin*,
500 U.S. 44 (1991) 24, 29, 35, 38
De Abadia-Peixoto v. *United States Dep't of*
Homeland Sec., 277 F.R.D. 572 (N.D. Cal. 2011) 25
Deck v. *Missouri*, 544 U.S. 622 (2005) 11, 21, 28, 29
DeFunis v. *Odegaard*, 416 U.S. 312 (1974) 32
Estelle v. *Williams*, 425 U.S. 501 (1976) 28
Flanagan v. *United States*, 465 U.S. 259 (1984) ..... *passim*
Florence v. *Board of Chosen Freeholders*,
566 U.S. 318 (2012) 25, 29
General Tel. Co. v. *Falcon*, 457 U.S. 147 (1982) 37
Genesis Healthcare Corp. v. *Symczyk*,
569 U.S. 66 (2013) 35, 36
Gerstein v. *Pugh*, 420 U.S. 103 (1975) ..... *passim*
Gunn v. *Minton*, 568 U.S. 251 (2013) 16
Helstoski v. *Meanor*, 442 U.S. 500 (1979) 20, 22
Honig v. *Doe*, 484 U.S. 305 (1988) 42
Kingdomware Techs., Inc. v. *United States*,
136 S. Ct. 1969 (2016) 41, 43
Kokkonen v. *Guardian Life Ins. Co. of Am.*,
511 U.S. 375 (1994) 16

Cases—Continued: Page

Kremens v. *Bartley*, 431 U.S. 119 (1977) 37
Lane v. *Williams*, 455 U.S. 624 (1982) 42
Lewis v. *Continental Bank Corp.*, 494 U.S. 472 (1990) 31
Midland Asphalt Corp. v. *United States*,
489 U.S. 794 (1989) 19, 20, 21, 22
Mohawk Indus., Inc. v. *Carpenter*,
558 U.S. 100 (2009) 24, 26
Murphy v. *Hunt*, 455 U.S. 478 (1982) 40
O'Shea v. *Littleton*, 414 U.S. 488 (1973) 41, 42
Parr v. *United States*, 351 U.S. 513 (1956) 30
Pasadena City Bd. of Educ. v. *Spangler*,
427 U.S. 424 (1976) 38, 39
Press-Enter. Co. v. *Superior Court*,
478 U.S. 1 (1986) 41, 43
Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 30
Roe v. *Wade*, 410 U.S. 113 (1973) 41, 43
Schall v. *Martin*, 467 U.S. 253 (1984) 38
Sell v. *United States*, 539 U.S. 166 (2003) 22
Smith v. *Bayer Corp.*, 564 U.S. 299 (2011) 37
Sosna v. *Iowa*, 419 U.S. 393 (1975) 15, 33, 34, 35, 37, 38
Spencer v. *Kemna*, 523 U.S. 1 (1998) 43
Stack v. *Boyle*, 342 U.S. 1 (1951) 20, 22
Swisher v. *Brady*, 438 U.S. 204 (1978) 35, 38
Turner v. *Rogers*, 564 U.S. 431 (2011) 41, 43
United States Parole Comm'n v. *Geraghty*,
445 U.S. 388 (1980) 36, 38
United States v. *Hollywood Motor Car Co.*,
458 U.S. 263 (1982) 17, 18, 21, 26
United States v. *Howard*, 480 F.3d 1005 (2007) 3, 8, 9, 29
United States v. *MacDonald*,
435 U.S. 850 (1978) 21, 23, 25, 26
United States v. *Zuber*, 118 F. 3d 101 (2d Cir. 1997) 3

Cases—Continued: Page

Weinstein v. *Bradford*, 423 U.S. 147 (1975) 43
Will v. *United States*, 389 U.S. 90 (1967) 12, 29, 30

Constitution, statutes, and rules:

U.S. Const.:
Art. III 13, 15, 31
Amend. IV 34
Amend. V 35
Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 87 2
All Writs Act, 28 U.S.C. 1651(a) 2, 10, 14, 27
8 U.S.C. 1325 8
18 U.S.C. 875(c) 8
18 U.S.C. 1544 8
18 U.S.C. 3145(c) 18
18 U.S.C. 3731 18
18 U.S.C. 3742 18
21 U.S.C. 952 8
21 U.S.C. 960 8
28 U.S.C. 566(a) 2
28 U.S.C. 566(i) 2
28 U.S.C. 1291 ..... 2, 13, 14, 16, 17, 20
Fed. R. Civ. P.:
Rule 23 ..... 15, 33, 34, 36, 37, 39
Rule 23(e) 37
Rules 26-37 24
Rule 65 24
Fed. R. Crim. P. 16 24

Miscellaneous:

U.S. Marshals Serv., *Policy Directives: Prisoner Operations*, https://www.usmarshals.gov/foia/directives/prisoner_operations.pdf 2, 3, 5

In the Supreme Court of the United States

No. 17-312

UNITED STATES OF AMERICA, PETITIONER

v.

RENE SANCHEZ-GOMEZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-70a) is reported at 859 F.3d 649. The opinion of the court of appeals panel (Pet. App. 71a-82a) is reported at 798 F.3d 1204. The order of the district court (Pet. App. 83a-99a) is not published in the Federal Supplement but is available at 2013 WL 6145601.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2017. The petition for a writ of certiorari was filed on August 29, 2017, and was granted on December 8, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Title 28, Section 1291 of the United States Code provides in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

2. Title 28, Section 1651(a) of the United States Code provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

1. The United States Marshals Service was created by the Judiciary Act of 1789 to ensure the safety of federal court personnel, litigants, and the public. Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 87. Congress has declared it "the primary role and mission of the United States Marshals Service to provide for the security" of the federal judiciary, including "the United States District Courts." 28 U.S.C. 566(a). The Marshals Service performs its functions in "consult[ation] with the Judicial Conference of the United States," but it "retains final authority regarding security requirements for the judicial branch of the Federal Government." 28 U.S.C. 566(i).

The Marshals Service has determined that the use of physical restraints can provide a vital tool for ensuring the safety of court personnel, the public, and detainees themselves. See U.S. Marshals Service, *Policy Directives: Prisoner Operations* § 9.18.E (*Prisoner Operations*), https://www.usmarshals.gov/foia/directives/prisoner_

operations.pdf. The Marshals Service has directed, for example, that detainees should typically be restrained during transportation to and from the courtroom. *Id.* §§ 9.18.D.3, 9.18.E.a. And in particular judicial districts, the Marshals Service has, in consultation with the district courts, implemented policies involving the maintenance of physical restraints on detainees in the courtroom during at least some non-jury proceedings. See *id.* § 9.18.E.b.

In *United States* v. *Howard*, 480 F.3d 1005 (2007), the Ninth Circuit upheld a policy "implemented by the United States Marshals Service for the Central District of California after consultation with the magistrate judges," under which "pretrial detainees making their first appearance before a magistrate judge wear leg shackles." *Id.* at 1007. The court explained that the policy "concern[ed] only proceedings conducted without the presence of a jury" and "address[ed] legitimate security concerns," including that "security-related information concerning defendants typically is incomplete" at the time of their first courtroom appearances, and that "understaffed security officers must provide courtroom security in a large and unsecured space." *Id.* at 1013-1014. The court noted that its decision was consistent with a previous decision of the Second Circuit, which had upheld, based on deference to a Marshals Service recommendation, the use of arm and leg restraints during a non-jury sentencing proceeding. *Id.* at 1013; see *United States* v. *Zuber*, 118 F.3d 101, 104 (2d Cir. 1997) (reasoning that a district judge in a non-jury proceeding may, "without further inquiry," elect to "defer to the professional judgment of the Marshals Service regarding the precautions that seem appropriate or necessary in the circumstances").

2. Courtroom security concerns are particularly acute in the five judicial districts—the Southern District of California, the Districts of Arizona and New Mexico, and the Western and Southern Districts of Texas—on the Nation's southwest border. Those districts alone account for nearly 40% of the Marshals Service's total daily prisoner population. C.A. S.E.R. 64. They also "handle[] a large volume of criminal cases arising from reactive arrests, where the arresting agent typically will know far less about the defendant's background and behavior than agents effectuating arrests following proactive investigations." *Ibid.*

By mid-2013, four of those five districts had adopted a policy of "routinely using full restraints for most non-jury proceedings." C.A. S.E.R. 64. "'Full restraints' means that a defendant's hands are closely handcuffed together, these handcuffs are connected by chain to another chain running around the defendant's waist, and the defendant's feet are shackled and chained together." Pet. App. 3a. The only southwest-border district not yet following such a policy by that time was the Southern District of California. C.A. S.E.R. 61.

The Southern District, however, had been "experienc[ing] an increase in security incidents" during the preceding years. C.A. S.E.R. 61. The Marshals Service in that district was (and is) responsible for the security of a recently constructed 16-story Annex courthouse in San Diego, a separate five-story courthouse in San Diego, and a smaller courthouse in El Centro. *Id.* at 59. The Marshals Service was required to cover "as many as 18 to 22 different district judge and magistrate judge calendars on a single day." *Id.* at 60. It also routinely produced as many as 40 to 50 detainees to a single magistrate's courtroom at the same time. *Ibid.* Detainees

usually stand in the jury box, which is 2 to 7 feet from defense counsel's table, 2 to 9 feet from the public gallery, 2 to 7 feet from the interpreter, 11 to 16 feet from the courtroom clerk, 14 to 18 feet from the magistrate judge, and 14 to 19 feet from the unlocked courtroom doors leading to the public hallway. *Ibid.*

In March 2013, the United States Marshal for the Southern District of California submitted a letter requesting that the district's judges approve a "district-wide policy of allowing the Marshals Service to produce all in-custody defendants in full restraints for most non-jury proceedings." J.A. 76. The Marshal's request was prompted by a combination of factors: a high volume of detainees moving through the district's cell blocks (more than 44,000 during Fiscal Year 2012), concerns about understaffing, and "multiple incidents" in which weapons had been found in holding cells. J.A. 76-77. The Marshal also noted that two serious incidents—an assault and a stabbing—had recently occurred in the district's courtrooms, explaining that another such incident "would clearly endanger those present." J.A. 77. The Marshal emphasized that "other comparable districts" had already adopted a full-restraints policy, which was also consistent with the directive of the national Marshals Service. *Ibid.*; see *Prisoner Operations* § 9.18.E.3.b.

In October 2013, after soliciting and considering views from a variety of sources (including the Offices of the U.S. Attorney and the Federal Defender), the Chief Judge informed the Marshal that the judges of the Southern District had approved the Marshal's request in most respects. J.A. 78. The request was denied, however, as to detainees appearing at plea and sentencing hearings, during which hand and arm restraints would

be removed. J.A. 78-79. In addition, any district or magistrate judge could "direct the Marshals to produce an in-custody defendant without restraints." J.A. 78. Finally, individual detainees could "ask [a] judge to direct that the[ir] restraints be removed in whole or in part," at which point the judge would make an individualized determination about the need for restraints. J.A. 79.

3. Respondents are four former federal pretrial detainees who made initial appearances before magistrate judges in the Southern District of California in October 2013. Pet. App. 34a-35a & n.2. Consistent with the security policy approved by the district's judges, the Marshals Service produced each respondent in full restraints. *Id.* at 35a. Respondents raised constitutional objections to the security policy at their initial hearings or arraignments but were overruled. *Id.* at 35a & n.2.

Three respondents filed emergency motions challenging the rulings in their cases and asking the district court to "[r]evoke" the district-wide security policy. Pet. App. 84a. Relying on the Ninth Circuit's prior decision in *Howard*, the court denied those motions (as well as a separate challenge to the magistrate judge's ruling in the fourth respondent's case). *Id.* at 83a-99a, 104a. In denying the motions, the court emphasized several district-specific factors that justified the security policy, including: the large number of in-custody detainees; the physical layout of the district's courtrooms and courthouses; and a troubling record of recent in-court assaults, including a stabbing, as well as "multiple incidents of prisoner-made weapons." *Id.* at 92a-93a. The court also noted that the district's "need for security [had] increased" in recent years due to a focus "on prosecuting defendants with violent or extensive

criminal histories, and ties to gangs or drug cartels." *Id.* at 93a.

The district court further explained that "proceedings involving multiple defendants," such as cases in which defendants "enter pleas *en masse* before magistrate judges," pose particularly "heightened" security risks. Pet. App. 93a, 95a. Judges in the Southern District hear "upwards of 20 cases or more" on a typical calendar day, and "practical considerations make it impossible to know the sequence in which each case will be called." *Id.* at 94a. The process of removing the restraints from a defendant (each of whom is transported in full restraints) "ordinarily requires three Marshals," because two "stand guard to prevent attacks on the Marshal who is unlocking and removing the shackles, either by kicking, or by swinging hand shackles like a mace." *Ibid.* Thus, in addition to overtaxing the Marshals Service's limited resources, "[r]equiring the unshackling of each defendant before the hearings, and reshackling each one afterwards for safe transport, would result in delays of up to two hours" per day per courtroom, "eating up court time" and requiring that detainees "be held in restraints longer (while waiting for their cases to be called)." *Ibid.*

In light of those considerations—and the expertise of the Marshals Service, which is "familiar with the tasks of guarding detainees, maintaining courtroom security, and transferring detainees to and from court"—the district court determined that the security policy "is reasonably related to legitimate government interests and does not violate [respondents'] constitutional rights." Pet. App. 98a-99a. The court emphasized, however, that judges must continue to weigh "countervail-

ing interests" in appropriate cases and to direct "deviations from the policy" when necessary. *Id.* at 98a (citing *Howard*, 480 F.3d at 1013-1014).

4. In November 2013, respondents filed separate appeals to the Ninth Circuit. J.A. 1, 5, 10, 15. Before the court of appeals issued any decision on those appeals, however, each respondent's criminal case was resolved.

Patricio-Guzman: On October 31, 2013, respondent Patricio-Guzman pleaded guilty to misdemeanor illegal entry, in violation of 8 U.S.C. 1325, and was sentenced to 30 days of imprisonment. J.A. 36-37 (Dkt. No. 12).

Sanchez-Gomez: On November 21, 2013, respondent Sanchez-Gomez pleaded guilty to felony misuse of a passport, in violation of 18 U.S.C. 1544. J.A. 26-27 (Dkt. No. 36). On December 20, 2013, he was sentenced to five years of probation. J.A. 30-31 (Dkt. No. 48).

Morales: On March 11, 2014, after being released on bond and rearrested for failure to appear, respondent Morales pleaded guilty to a controlled-substance offense, in violation of 21 U.S.C. 952 and 960. J.A. 60-61 (Dkt. No. 85). On June 19, 2014, she was sentenced to 18 months of imprisonment and three years of supervised release. J.A. 61-62 (Dkt. No. 95).

Ring: On October 23, 2014, the district court granted the government's motion, pursuant to a deferred-prosecution agreement, to dismiss the charges against respondent Ring for making an interstate threat to kidnap, kill, or injure, in violation of 18 U.S.C. 875(c). J.A. 63, 66, 75 (Dkt. Nos. 1, 19, 47).

5. In August 2015, a panel of the court of appeals vacated and remanded for further proceedings. Pet. App. 71a-82a. In asserting appellate jurisdiction, the panel cited *Howard*, which had relied on the collateral-order

doctrine to entertain interlocutory appeals from the denials of motions seeking the removal of restraints during pretrial proceedings. *Id.* at 75a; see *Howard*, 480 F.3d at 1009, 1011-1012. And although the panel recognized that respondents were "no longer detained," it viewed their claims as "not moot" under "the exception to the mootness doctrine for cases that are 'capable of repetition, yet evading review.'" Pet. App. 75a (quoting *Howard*, 480 F.3d at 1009).

On the merits, the panel declined to hold "that a blanket policy of shackling defendants in non-jury proceedings is never permissible," and it recognized that *Howard* previously had "approved of one such policy." Pet. App. 81a (citing 480 F.3d at 1008). But the panel concluded that, "[o]n this record, the Southern District has failed to provide adequate justification for its restrictive shackling policy." *Id.* at 73a.

6. The court of appeals granted rehearing en banc and requested supplemental briefing on "whether we lack appellate jurisdiction over these appeals, contrary to our holding in United States v. Howard." J.A. 3. Following argument, the court issued a 6-5 decision invalidating the security policy approved by the Southern District's judges. Pet. App. 1a-30a.

a. Addressing the threshold question of its own authority to adjudicate the appeals, the majority observed that respondents had requested "relief not merely for themselves, but for all in-custody defendants in the district." Pet. App. 7a. The majority acknowledged that the request did not fit within its limited jurisdiction over "immediately appealable collateral orders." *Id.* at 6a. But the majority reasoned that respondents had raised "class-like claims * * * asking for class-like relief,"

which could be treated as petitions for writs of mandamus under the All Writs Act, 28 U.S.C. 1651(a). Pet. App. 7a. The majority stated that it was authorized to issue "[s]upervisory and advisory writs," through which a court may "provide broader relief" than would be available under a traditional writ of mandamus. *Id.* at 8a. And although granting the writ required a showing of "clear error," *id.* at 9a (citation omitted), the majority deemed it sufficient that "some form of routine shackling has become a common practice and thus is an oft-repeated error," *id.* at 10a.

The majority further held that the case was not moot, notwithstanding the completion of respondents' criminal cases. Pet. App. 11a-17a. The majority recognized that respondents are "no longer subject to the complained-of policy" and no longer have "personal interests in the outcome of this case." *Id.* at 11a-12a. The majority further acknowledged that it could not apply the "capable-of-repetition-yet-evading-review exception" to mootness, because the exception requires a likelihood of repetition "as to the particular complainants, and we cannot presume that [respondents] will be subject to criminal proceedings in the future." *Id.* at 12a. The majority concluded, however, that it was authorized to decide this case by *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), which had permitted the continuation of a civil class-action suit notwithstanding the mootness of the original named plaintiffs' claims. Pet. App. 13a-16a. Although *Gerstein*, unlike this case, involved a civil suit that had formally been certified as a class action, the majority labeled this case a "functional class action" that could be treated in the same manner. *Id.* at 13a-14a. In the majority's view, so long as a case can be deemed to have three features present in *Gerstein*—a challenge to

"broader policies" rather than "individual violations," a "continually changing group[] of injured individuals who would benefit from any relief," and "common representation"—a mandamus claim may outlast the claimant's personal interest in its resolution. *Id.* at 14a.

On the merits, the majority invalidated the district's security policy, although it withheld "the issuance of a formal writ of mandamus" because the challenged security policy "isn't presently in effect" as a result of the earlier panel ruling. Pet. App. 30a; see *id.* at 31a (Schroeder, J., concurring). The majority based its merits ruling on *Deck* v. *Missouri*, 544 U.S. 622 (2005), which had concluded that due process requires an individualized justification for visibly restraining a defendant in front of a jury during the guilt and penalty phases of a capital trial. *Id.* at 624, 629, 633. In the majority's view, that rule "applies whether the proceeding is pretrial, trial, or sentencing, with a jury or without." Pet. App. 19a. The majority acknowledged that *Deck* had found "that the common law drew a distinction between trial and pretrial proceedings," because "'Blackstone and other English authorities recognized that the rule [disfavoring restraints] did not apply at the time of arraignment, or like proceedings before the judge.'" *Id.* at 24a (quoting *Deck*, 544 U.S. at 626) (internal quotation marks omitted). But it viewed *Deck*'s statement as "dictum" that is "contradicted by the very sources on which the Supreme Court relied." *Ibid.*; see *id.* at 24a-28a.

b. Judge Ikuta dissented, reasoning that the majority's analysis was "wrong at every turn" and invited "potentially grave consequences for state and federal courthouses throughout [the] circuit." Pet. App. 32a, 70a.

The dissent first explained that respondents' appeals should have been dismissed as moot because respondents "have no ongoing interest in the purely prospective relief they seek." Pet. App. 37a. It rejected the majority's "functional class action" exception to mootness, *id.* at 39a (citation omitted), observing that jurisdiction in *Gerstein* was not based on the three features identified by the majority, but rather on the concept that a formal class action acquires "independent legal status" through certification, *id.* at 40a (citation omitted). The dissent explained that, whereas a formal class certification can "relate back" to the live controversy that existed at the time a civil suit was filed, *id.* at 42a, this case involved no "class that has an independent legal status, whether under Rule 23 or otherwise," and hence "nothing a court can 'relate back' after a criminal defendant's individual claim becomes moot." *Id.* at 46a.

The dissent added that this case also "do[es] not meet the requirements for granting a writ of supervisory mandamus," which the dissent viewed as being limited to instances in which "a district court has engaged in 'willful disobedience.'" Pet. App. 52a (quoting *Will* v. *United States*, 389 U.S. 90, 100 (1967)). In this case, the dissent observed, the district court had relied on *Howard* and thus had "complied with [the Ninth Circuit's] last word on the matter." *Id.* at 53a.

On the merits, the dissent would have "follow[ed] *Deck*'s reading of the common law," which "establishes that there is no common law rule against the use of restraints during pretrial proceedings," and would have abstained from "inventing a new right out of whole cloth." Pet. App. 63a. "The majority's rule," the dissent concluded, "fails not only as a matter of law, but also as a matter of common sense." *Id.* at 70a. It will require

the Marshals Service either to "do the impossible (predict risks based on a dearth of predictive information)," or else to "sit idly by and suffer an identifiable, compelling harm (violence in the courtroom)." *Ibid.* The dissent predicted that the majority's "one-size-fits-all security decree," laid down "by appellate jurists far removed from the day-to-day administration of criminal justice," would "put[ ] federal district courts at risk" and potentially create "even greater dangers" for state courts. *Id.* at 69a & n.14.

SUMMARY OF ARGUMENT

The Ninth Circuit lacked authority to adjudicate the merits of respondents' challenge to the security policy adopted by the judges of the Southern District of California. Its decision striking down that policy was neither authorized by statute nor permissible under Article III.

A. The federal courts of appeals are vested, under 28 U.S.C. 1291, with jurisdiction only over appeals from "final decisions of the district courts." That final judgment rule is construed with particular strictness in the criminal context, where piecemeal review is especially harmful. The district-court orders at issue here, which rejected respondents' objections to the use of restraints during pretrial proceedings, were not final decisions in their criminal cases.

Respondents err in asserting that the Ninth Circuit was nevertheless authorized to assume jurisdiction over their appeals under the collateral-order doctrine. That doctrine recognizes a limited class of pre-final-judgment orders, deemed "final" for purposes of appellate review, that may be appealed to vindicate an important right that would lose all value if not upheld immediately. Regardless of whether respondents' claims are construed narrowly or broadly, they do not qualify

for immediate appeal. To the extent that respondents challenge the procedures followed in their criminal cases, those claims could be reviewed at the conclusion of those proceedings, at which point any necessary showing of prejudice could be made and relief could be granted. And to the extent that respondents are raising "district-wide shackling claims [that] aren't connected to [their] individual criminal cases," Pet. App. 10a, their claims are effectively challenges to their conditions of confinement, which are more appropriately addressed through a civil action. Finally, relaxing the collateral-order doctrine as respondents suggest, to create a new category of interlocutory criminal appeals, would cause disruption and undermine the purposes of the final-judgment rule.

The en banc majority recognized that it could not assume jurisdiction over respondents' appeals under Section 1291. The majority believed it was nevertheless empowered by the All Writs Act, 28 U.S.C. 1651(a), to invalidate the security policy by means of a "'supervisory' or 'advisory'" writ of mandamus. Pet. App. 8a. Respondents' appeals, however, do not satisfy any of the "three conditions" necessary for a writ of mandamus, *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380 (2004). First, respondents had "other adequate means" of obtaining appellate review of their claims, *id.* at 380 (citation omitted), either by filing appeals of final judgments of conviction in the normal course in their own cases, or by filing a civil class action seeking district-wide relief. Second, respondents have no "clear and indisputable" right to issuance of the writ, *id.* at 381 (citation omitted), given that the district court, in rejecting their claims, relied on pertinent rulings by the Ninth Circuit and this Court. Third, this case does not

exhibit "exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion," *id.* at 380-381 (citations and internal quotation marks omitted). At most, respondents have raised a run-of-the-mill claim of pretrial error on a contestable issue, which cannot justify mandamus review in a criminal case.

B. The Ninth Circuit also lacked authority to adjudicate respondents' claims for the additional reason that those claims became moot before the court ruled. The criminal cases of all four respondents—and thus all pretrial proceedings to which the challenged security policy could have applied—had completely ended before the Ninth Circuit decided their appeals. Respondents therefore had no continuing personal stake, sufficient for purposes of Article III, in the fate of the policy.

The Ninth Circuit purported to rescue respondents' appeals from mootness by conceiving of their challenges as "functional class actions." Pet. App. 13a. But that procedural invention has no grounding in this Court's decisions. Only a true class action can outlast a litigant's personal stake in the case's outcome: Once certified under Rule 23, a class action "acquire[s] a legal status separate from the interest asserted by" the plaintiff, such that the class's interest may survive even if the plaintiff's has ended. *Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975). And where the plaintiff's claims become moot before the district court has ruled on class certification, a subsequent certification may be deemed to "relate back" to the filing of the complaint. See *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975). But the existence of that Federal Rules-based mechanism for addressing inherently transitory claims provides no license for courts to create their own "functional" analogues that

lack any affirmative authorization, formal procedures, or doctrinal safeguards. A "functional" class action in which a litigant seeks relief only in his personal capacity has no independent legal status, no interest separate from the litigant's, and no certification that can be "related back" to a time when an actual case or controversy existed.

Respondents' claims also cannot be saved from mootness under the exception for cases that are capable of repetition, yet evading review. That exception applies only where the *same* complaining party reasonably expects to face the challenged governmental practice again in the future. The Southern District's security policy will not be applied to respondents again unless they face new criminal charges, and this Court has consistently refused to base jurisdiction on litigants' predictions of their own future criminal activity.

ARGUMENT

THE NINTH CIRCUIT EXCEEDED ITS AUTHORITY BY INVALIDATING THE SECURITY POLICY IN THIS CASE

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn* v. *Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). The Ninth Circuit's decision in this case disregarded both the constitutional and statutory constraints on its authority. Respondents' individual appeals were moot long before the en banc court of appeals ruled, because their individual criminal cases had concluded. With respect to statutory authority, although the majority correctly recognized that it lacked appellate jurisdiction under 28 U.S.C. 1291, it erred in concluding that it could circumvent that deficiency by relying on its mandamus powers to invalidate

a policy that accorded with all relevant precedent of both the Ninth Circuit and this Court. And it further erred in creating a novel "functional class action" device with no legal foundation to avoid the mootness of respondents' claims following the completion of their criminal proceedings.

A. The Ninth Circuit Lacked Statutory Authority For Its Decision

No statute provided the Ninth Circuit with authority to issue its decision in this case. The orders that respondents challenged were not "final decisions" appealable under 28 U.S.C. 1291, because they did not resolve respondents' criminal cases and were not collateral orders that could be treated as final for purposes of appeal. Nor could the Ninth Circuit permissibly rely on its mandamus authority (which it ultimately declined to exercise) to reconsider its previously expressed views on the circumstances under which pretrial restraints are permissible.

1. The district court's orders were not "final decisions" immediately appealable under 28 U.S.C. 1291

The general appellate-jurisdiction statute, 28 U.S.C. 1291, vests the courts of appeals with jurisdiction only over appeals from "final decisions of the district courts." *Ibid.* It thus embodies a final judgment rule that "is inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation." *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam). The en banc majority correctly declined to rely on Section 1291 to assert jurisdiction over the interlocutory appeals in this case. Pet. App. 6a-7a.

a. As this Court has explained, "[f]inality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940); see *ibid.* (finality requirement "was written into the first Judiciary Act"). The final-judgment rule is "crucial to the efficient administration of justice" and "serves several important interests." *Flanagan* v. *United States*, 465 U.S. 259, 263-264 (1984). Among other things, it "helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation," and it "reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals." *Ibid.*

The policy against piecemeal review "is at its strongest" in criminal cases. *Hollywood Motor Car*, 458 U.S. at 265. In that context, the final-judgment rule normally "prohibits appellate review until conviction and imposition of sentence." *Flanagan*, 465 U.S. at 263; see 18 U.S.C. 3742 (authorizing appeals from final sentences in certain circumstances). Congress has expressly permitted appeals from pretrial orders in criminal cases only in a few limited circumstances. See 18 U.S.C. 3145(c) (authorizing jurisdiction over appeals from pretrial release or detention orders); 18 U.S.C. 3731 (authorizing jurisdiction over government appeals from certain pretrial dismissal, suppression, and release orders). For other such orders, "[t]he correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick*, 309 U.S. at 325-326.

Here, each respondent raised his or her objection to the security policy during an initial appearance or arraignment before a magistrate judge. J.A. 20-21 (Dkt. No. 3); J.A. 33-34 (Dkt. No. 3); J.A. 44-45 (Dkt. No. 5); J.A. 65-66 (Dkt. No. 16). When those objections were overruled, respondents filed "Emergency Motion[s]" in the district court challenging the use of restraints during pretrial criminal proceedings. Pet. App. 84a. Respondents then appealed from the denials of those motions, but their criminal cases continued (and concluded without generating any further appeals). Accordingly, no respondent in this case appealed from a "final determination of the merits of [his or her] criminal charge[s]." *Berman* v. *United States*, 302 U.S. 211, 212 (1937).

b. Neither respondents nor the Ninth Circuit has suggested that respondents' appeals are from a final judgment. See *Berman*, 302 U.S. at 212-213 ("In criminal cases, as well as civil, the judgment is final for the purpose of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined.") (citation, ellipsis, and internal quotation marks omitted). Respondents have instead contended (Br. in Opp. 21-22)—and the Ninth Circuit panel initially held (Pet. App. 75a)—that appeal of the district court's rulings was permitted under the "collateral order doctrine."

First recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the collateral-order doctrine "carve[s] out a narrow exception to the normal application of the final judgment rule." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989). The doctrine identifies a "limited class" of collateral rulings that may be treated as "final," and thus appealable under Section 1291, even though they do not end the

proceedings in the district court. *Id.* at 799. To come within that "small class" of immediately appealable interlocutory rulings, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (citation omitted).

Because "the reasons for the final judgment rule are especially compelling in the administration of criminal justice," this Court has "interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases." *Flanagan*, 465 U.S. at 264-265 (citation and internal quotation marks omitted); see *id.* at 264 ("Promptness in bringing a criminal case to trial has become increasingly important as crime has increased, court dockets have swelled, and detention facilities have become overcrowded."). In the nearly 70 years since *Cohen* was decided, despite "numerous opportunities" to expand the doctrine, *Midland Asphalt*, 489 U.S. at 799, the Court has identified only four types of pretrial orders in criminal cases that fall within the collateral-order doctrine: an order denying a bond, *Stack* v. *Boyle*, 342 U.S. 1 (1951); an order denying a motion to dismiss on Double Jeopardy grounds, see *Abney* v. *United States*, 431 U.S. 651 (1977); an order denying a motion to dismiss under the Speech or Debate Clause, see *Helstoski* v. *Meanor*, 442 U.S. 500 (1979); and an order permitting the forced administration of antipsychotic drugs to render a defendant competent for trial, see *Sell* v. *United States*, 539 U.S. 166 (2003).

The circumstances in which the Court has "refused to permit interlocutory appeals" in criminal cases, by

contrast, have been "far more numerous." *Midland Asphalt*, 489 U.S. at 799. Those include an order denying a motion to dismiss under the Speedy Trial Clause, *United States* v. *MacDonald*, 435 U.S. 850 (1978); an order denying a motion to dismiss for prosecutorial vindictiveness, see *Hollywood Motor Car*, *supra*; an order disqualifying counsel, see *Flanagan*, *supra*; and an order denying a motion to dismiss for failure to maintain grand jury secrecy, see *Midland Asphalt*, *supra*.

c. As the en banc majority recognized, Pet. App. 6a-7a, the collateral-order doctrine does not permit the assertion of appellate jurisdiction over respondents' appeals here. An order requiring that a defendant be subject to physical restraints during pretrial proceedings is not "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. In the primary decision on which respondents' merits argument has relied, *Deck* v. *Missouri*, 544 U.S. 622 (2005), appellate review of the defendant's objection to physical restraints at sentencing occurred only *after* the defendant had been sentenced. See *id.* at 625. Upon determining that the defendant's due process rights had indeed been violated by the use of restraints, this Court reversed the decision affirming his sentence and remanded for further proceedings. See *id.* at 635. Respondents' own similar claims here could likewise have been considered—and, if appropriate, vindicated—on appeal in the normal course.

The right asserted by respondents is also distinct from the types of claims as to which this Court has permitted interlocutory review in criminal cases. Respondents are not invoking "an explicit statutory or constitutional guarantee that trial will not occur," *Midland Asphalt*, 489 U.S. at 801, for which "appellate review must

occur before trial to be fully effective," *Flanagan*, 465 U.S. at 266. See *Helstoski*, 442 U.S. at 507-508; *Abney*, 431 U.S. at 660-662. Nor do respondents claim a right to avoid an involuntary physical invasion that would allow for a trial that would otherwise be barred, see *Sell*, 539 U.S. at 176-177, or a right relating to pretrial release, see *Stack*, 342 U.S. at 4, either of which could similarly "become[] moot if review awaits conviction and sentence," *Flanagan*, 465 U.S. at 266. Instead, respondents are, at bottom, simply objecting to the *procedures* under which their criminal proceedings will take place—an objection that is indistinguishable from the sorts of claims that are regularly reviewed on appeal following final judgment. Cf. *Sell*, 539 U.S. at 176 (observing that litigant's forced-medication claim was "wholly separate * * * from questions concerning trial procedures").

The Court has recognized that such objections are not only capable of resolution, but are often more readily resolved, in an appeal following final judgment in the criminal case. They typically involve assertions of prejudice in the conduct of particular proceedings, such as respondents' assertions here that they could have been "hamstrung in communicating with their counsel, frustrating participation in their own defense," as a result of being maintained in restraints during pretrial hearings. Br. in Opp. 33; see Resp. C.A. Br. 24 (expressing concern that detainee may be "unnecessarily distracted or embarrassed to assist counsel in his defense") (emphasis omitted). As this Court has explained, however, when a litigant claims that a particular procedure will "make a trial unfair," the litigant is asserting a right for which "an ordinary appeal permits vindication." *Sell*, 539 U.S. at 177.

An interlocutory appeal would not be appropriate under the collateral-order doctrine, moreover, regardless whether respondents would have to demonstrate actual prejudice in order to succeed on their claim. If the "asserted right is one that is not violated absent some specifically demonstrated prejudice to the defense," then its "validity cannot be adequately reviewed until trial is complete," and thus it is not "independent of the issues to be tried." *Flanagan*, 465 U.S. at 268. Claims that such rights have been violated "necessitate[] a careful assessment of the particular facts of the case," and are therefore "best considered only after the relevant facts have been developed." *MacDonald*, 435 U.S. at 858; cf. *Flanagan*, 465 U.S. at 268-269. Conversely, "if establishing a violation of [the] asserted right requires no showing of prejudice to [the] defense, a pretrial order violating the right * * * is not 'effectively unreviewable on appeal from a final judgment'" for purposes of the collateral-order doctrine, because reversal after final judgment would be assured. *Flanagan*, 465 U.S. at 268. Thus, "whether or not [respondents'] claim requires a showing of prejudice," the district court's order upholding the use of restraints "does not qualify as an immediately appealable collateral order in a straightforward application of the necessary conditions laid down in prior cases." *Id.* at 269.

d. Notwithstanding that respondents have raised "concerns of prejudice" in their criminal proceedings to support their merits argument, Resp. C.A. Br. 23, they have premised their collateral-order doctrine argument on the asserted *absence* of prejudice in those proceedings. In particular, respondents have suggested (Br. in Opp. 21-22) that the security-related orders in their

cases could not effectively have been reviewed after final judgment was entered because, since the physical restraints were applied only in non-jury proceedings, "there would be no prejudice to review in appealing [the] criminal conviction." Even if that contention could be squared with their arguments on the merits, it would not justify appellate jurisdiction in this case.

The collateral-order doctrine does not authorize review of claims that "can be adequately vindicated by other means." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 107 (2009). If respondents' claims truly were not relevant to the substance of their criminal cases, they could have challenged the security policy through a civil suit. See, *e.g.*, *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991) (civil suit challenging timing of probable-cause hearing); *Gerstein* v. *Pugh*, 420 U.S. 103 (1975) (civil suit challenging absence of probable-cause hearing). Such a suit would have provided a far superior mechanism for resolving that type of claim. The civil process includes detailed rules and procedures for appropriate fact development. See Fed. R. Civ. P. 26-37. Comparable fact-finding procedures do not exist within the criminal context. Cf. Fed. R. Crim. P. 16 (imposing limited discovery obligations on prosecution and defense for evidence to be used at criminal trial). And civil courts, unlike criminal courts, are expressly authorized to issue preliminary and permanent injunctive relief. See Fed. R. Civ. P. 65. A civil suit would thus have ensured that appropriate relief was available and that appellate review of respondents' claims was based on an adequate record.

If, as the majority concluded below, respondents' "district-wide shackling claims aren't connected to [respondents'] individual criminal cases," Pet. App. 10a,

then respondents are, in substance, challenging the conditions of their confinement. The essence of their claim would be that, although they may be restrained in this manner while in other locations—such as during transportation to and from the courthouse, or between the holding cell and the courtroom—they may not be restrained in the courtroom itself. Conditions-of-confinement claims are commonly raised in civil, not criminal, actions. See, *e.g.*, *Florence* v. *Board of Chosen Freeholders*, 566 U.S. 318 (2012) (civil suit challenging detainee strip-search policy); *Bell* v. *Wolfish*, 441 U.S. 520 (1979) (civil suit challenging conditions of pretrial confinement); cf. *De Abadia-Peixoto* v. *United States Dep't of Homeland Sec.*, 277 F.R.D. 572 (N.D. Cal. 2011) (civil challenge to use of restraints in immigration court).

e. Permitting such claims to be litigated on interlocutory appeal in a criminal case also "would severely undermine the policies behind the final judgment rule," *Flanagan*, 465 U.S. at 270, because "nothing about the circumstances * * * inherently limits the availability of the claim." *MacDonald*, 435 U.S. at 862. Any detainee dissatisfied with a trial court's decision about the manner in which he is brought before the court (protective measures, clothing, etc.) could immediately appeal that decision. If trial proceedings were to be put on hold until the appeal was resolved, the result would be to freeze the criminal process altogether, imposing costly delays and inviting gamesmanship. See *ibid.* ("Among other things, delay may prejudice the prosecution's ability to prove its case, [and] increase the cost to society of maintaining those defendants subject to pretrial detention."). If, instead, appeal of the pretrial order imposing restraints proceeded simultaneously with the trial, the

legal proceedings would multiply, requiring the prosecution and defense to litigate the restraint issue on appeal at the same time that the defendant's guilt or innocence was being adjudicated in district court. Either option "would severely undermine the policies behind the final judgment rule." *Flanagan*, 465 U.S. at 270.

The effect of expanding the collateral-order doctrine in the manner respondents suggest would not be limited to claims challenging the use of physical restraints or the conditions of confinement. "Nothing about" an order imposing pretrial restraints "distinguishes it from the run of pretrial judicial decisions that affect the rights of criminal defendants yet must await completion of trial court proceedings for review." *Flanagan*, 465 U.S. at 270. Although respondents assert dignitary and other harms that are unrelated to prejudice in their criminal cases, that does not adequately differentiate their claims from other types of claims that are not subject to collateral-order appeal. See, *e.g.*, *MacDonald*, 435 U.S. at 858 (noting that, although the Speedy Trial Clause seeks primarily "to limit the possibility that the defense will be impaired," it also seeks "to prevent oppressive pretrial incarceration" and "to minimize anxiety and concern of the accused") (citation omitted); cf. *Mohawk Indus.*, 558 U.S. at 108-113 (rejecting argument that "confidentiality" interest justified collateral-order appeals of denials of claims of attorney-client privilege). If defendants could obtain immediate appellate review simply by asserting claims of dignitary harm, separate from claims of prejudice in the context of their criminal proceedings, "the policy against piecemeal appeals in criminal cases would be swallowed by ever-multiplying exceptions." *Hollywood Motor Car*, 458 U.S. at 270.

f. Respondents cannot have it both ways. To the extent that their claims relate to their criminal proceedings, and are appropriately raised as motions in their criminal cases, respondents cannot sever the prejudice aspects of their argument in order to invoke the collateral-order doctrine. And to the extent the en banc majority correctly assessed that the substance of respondents' request was "*not* review [of] the individual [respondents'] shackling decisions," but instead review of their "district-wide challenges" to the security policy, Pet. App. 6a (emphasis added), such review was available by other means. The majority thus correctly "s[aw] no reason" to consider the collateral-order doctrine as providing a jurisdictional basis for its decision. *Ibid.*

2. The Ninth Circuit did not have authority to issue a writ of "supervisory mandamus"

The majority below recognized that it lacked appellate jurisdiction over respondents' claims. See Pet. App. 6a-7a. It determined instead that it had authority to review those claims under the All Writs Act, 28 U.S.C. 1651(a). That was incorrect. Even if respondents' appeals could properly be "construe[d] * * * as petitions for writs of mandamus," Pet. App. 7a, the Ninth Circuit was not empowered to "exercise [its] 'supervisory' or 'advisory' authority" to invalidate the Southern District of California's security policy, *id.* at 8a.

This Court has recognized three "conditions" that limit a court's authority to issue a writ of mandamus under the All Writs Act. *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380 (2004). First, "the party seeking issuance of the writ must have no other adequate means to attain the relief he desires." *Ibid.* (brackets and citation omitted). Second, the party seeking the writ must demonstrate "that his right to issuance of the

writ is clear and indisputable." *Id.* at 381 (brackets, citation, and internal quotation marks omitted). Third, that party must also demonstrate that issuance of the writ is "appropriate under the circumstances," by pointing to "exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion." *Id.* at 380-381 (citations and internal quotation marks omitted). Those conditions are more readily satisfied in some circumstances than in others; the Court has recognized, for example, that the "paramount necessity of protecting the Executive Branch from vexatious litigation" deserves significant weight in the analysis. *Id.* at 382. Respondents here, however, can satisfy none of them.

First, respondents had "other adequate means" to obtain appellate review of their claims, *Cheney*, 542 U.S. at 380 (citation omitted). As previously explained, to the extent respondents objected to the use of pretrial restraints in their own criminal cases, they could have sought to overturn their convictions in the normal course following final judgment. See *Deck*, 544 U.S. at 635 (reversing and remanding based on defendant's due process challenge to use of restraints during capital sentencing); cf. *Estelle* v. *Williams*, 425 U.S. 501, 512-513 (1976) (declining to reverse conviction, despite defendant's due process objection to being compelled to wear jail garb in front of jury, because objection was not adequately preserved). And insofar as respondents sought to challenge the security policy as a general matter—separate from whether the use of restraints in their individual cases provided a basis for challenging their convictions on appeal—that challenge would more properly have been brought in a civil suit, as a class ac-

tion if appropriate, with appellate review available following issuance or denial of the requested relief. See, *e.g.*, *Florence*, *supra*; *McLaughlin*, *supra*; *Bell*, *supra*. Proceedings on a writ of supervisory mandamus—which, *inter alia*, are unlikely to allow for the development of a full record—cannot take the place of an orderly civil action.

Second, respondents cannot show that their "right to issuance of the writ is clear and indisputable," *Cheney*, 542 U.S. at 381 (citations and internal quotation marks omitted). In rejecting respondents' claims, the district court relied on the Ninth Circuit's prior decision in *United States* v. *Howard*, 480 F.3d 1005 (2007), which had upheld the Central District of California's policy of maintaining leg restraints on criminal defendants during their initial appearances. *Howard*, in turn, relied on this Court's statement in *Deck* that the common-law rule against physically restraining criminal defendants "did not apply at 'the time of arraignment,' or like proceedings before the judge." *Id.* at 1012 (quoting *Deck*, 544 U.S. at 626); see *id.* at 1014 (upholding the policy at issue because it "concern[ed] only proceedings conducted without the presence of a jury," and "was adopted by the magistrate judges of the court following consultation with the Marshals Service to address legitimate security concerns").

The district court's reliance on *Howard*—and, by extension, *Deck*—is not a circumstance that warrants the corrective remedy of mandamus. See Pet. App. 87a (district court observing that respondents were "essentially arguing the losing position in *Howard*"). "Mandamus, it must be remembered, does not run the gauntlet of reversible errors." See *Will* v. *United States*, 389 U.S. 90, 104 (1967) (citation and internal quotation

marks omitted). Although the district court failed to anticipate that a bare majority of Ninth Circuit judges sitting on the en banc panel would distinguish this case from *Howard*, "the most that can be claimed on this record is that [the district court] may have erred in ruling on matters within [its] jurisdiction." *Id.* at 103-104. That is not enough for mandamus relief. See *id.* at 104.

Third, for related reasons, respondents have identified no "exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion," *Cheney*, 542 U.S. at 380 (citations and internal quotation marks omitted), sufficient to warrant mandamus. Because the "general policy against piecemeal appeals takes on added weight in criminal cases," *Will*, 389 U.S. at 96, this Court has been particularly reluctant to allow mandamus review in such cases. See *id.* at 96-98; see also *Parr* v. *United States*, 351 U.S. 513, 519-520 (1956). Although mandamus may be appropriate in certain circumstances, such as "willful disobedience of the rules laid down by this Court," *Will*, 389 U.S. at 100, or "a deliberate policy in open defiance of the federal rules in matters of pretrial criminal discovery," *id.* at 102, the district court's "good faith effort to follow [circuit] case law" here does not present such a circumstance. Pet. App. 53a (Ikuta, J., dissenting). Rather, because the "district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power," the Ninth Circuit in this case "has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted that court's appellate review to final judgments of the district court." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 32 (1943).

B. Respondents' Claims Had Become Moot Before The Ninth Circuit Adjudicated Them

Even assuming the Ninth Circuit had statutory footing for its decision, it lacked authority under the Constitution to issue that decision in the context of criminal cases that had long since concluded. Article III's case-or-controversy requirement "subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Therefore, if the party invoking a court's jurisdiction ceases to have a "personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 669 (2016) (citation and internal quotation marks omitted). The court of appeals erred in declining to adhere to that rule here.

1. Respondents lost their personal interest in the outcome of the litigation when their criminal cases ended

In the district court, respondents raised objections to the maintenance of physical restraints during non-jury pretrial proceedings. Although respondents assuredly had a concrete, personal interest in the resolution of those claims when they were raised, respondents' personal stake ended when their criminal proceedings were completed, thereby eliminating any possibility of further pretrial non-jury proceedings.

Three respondents pleaded guilty and received criminal sentences, with the last final judgment imposed on June 19, 2014. See J.A. 37 (judgment entered November 6, 2013, against respondent Patricio-Guzman) (Dkt. No. 15); J.A. 30-31 (judgment entered December 20, 2013, against respondent Sanchez-Gomez) (Dkt. No.

48); J.A. 61-62 (judgment entered June 19, 2014, against respondent Morales) (Dkt. No. 95). The remaining respondent (Ring) entered into a deferred-prosecution agreement with the government, J.A. 66 (Dkt. No. 19), and an order dismissing the charges against him was entered on October 23, 2014, J.A. 75 (Dkt. No. 47). No respondent appealed from the final judgment entered by the district court in his or her case.

Respondents' criminal cases were therefore over by the time the Ninth Circuit issued its decisions on August 25, 2015 (panel), and May 31, 2017 (en banc). See Pet. App. 2a, 72a. As the en banc majority accordingly recognized, respondents' "personal interests in the outcome of th[e] case ha[d] expired," because they were "no longer subject to the policy." *Id.* at 12a. Their appeals (even if properly treated as mandamus petitions) accordingly should have been dismissed as moot, as "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them," *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974) (per curiam) (citation omitted).

2. Respondents' claims cannot be saved from mootness by construing their challenges as "functional class actions"

The en banc majority concluded that it could avoid the necessity of dismissal because its resolution of respondents' outdated challenges would affect *other* criminal defendants in the Southern District of California. Invoking *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the majority asserted that respondents' challenges could be treated as "functional class actions" amenable to adjudication long after respondents themselves had ceased to have a stake in the outcome. Pet. App. 13a. But the

rule applied in *Gerstein* is limited to *actual* class actions, which—unlike the "functional class action" created by the Ninth Circuit—involve a formally certified class with an independent legal status and a continuing interest in the case that persists even after the named plaintiff's own interest expires.

a. In *Sosna* v. *Iowa*, 419 U.S. 393 (1975), this Court considered a constitutional challenge to an Iowa law that imposed a residency requirement for initiating a divorce proceeding. *Id.* at 395-396. The plaintiff filed her challenge as a class action and successfully obtained class certification under Federal Rule of Civil Procedure 23, but she lost on the merits. 419 U.S. at 397-398. "By the time her case reached this Court," she "had long since satisfied the Iowa durational residency requirement," *id.* at 398, and she had also obtained a divorce in another state, *id.* at 398 n.7. The Court thus observed that if the plaintiff "had sued only on her own behalf," her lack of continued personal stake in the outcome "would make this case moot and require dismissal." *Id.* at 399.

Crucially, however, the plaintiff had "brought th[e] suit as a class action," a "factor [that] significantly affects the mootness determination." *Sosna*, 419 U.S. at 399. "When the District Court certified the propriety of the class action," the Court explained, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the plaintiff]." *Ibid.* (footnote omitted). As a result, even though the controversy had become moot as to the named plaintiff, it "remain[ed] very much alive for the class of persons she ha[d] been certified to represent." *Id.* at 401. Thus, after satisfying itself that the requirements of Rule 23 had been met and that the class was

properly certified, *id.* at 403, the Court went on to resolve the plaintiff's claim on the merits, *id.* at 404-410.

In *Sosna*, the plaintiff's claim became moot only after she had obtained class certification. 419 U.S. at 398. But the Court also addressed in a footnote the possibility that "the controversy involving the named plaintiffs [might be] such that it becomes moot as to them *before* the district court can reasonably be expected to rule on a certification motion." *Id.* at 402 n.11 (emphasis added). "In such instances," the Court continued, "whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review." *Ibid.*

In *Gerstein*, the Court addressed the relation-back issue left open in *Sosna*. The plaintiffs there had filed a class action challenging, on Fourth Amendment grounds, state procedures that permitted certain criminal defendants to be jailed before trial without a probable cause determination. 420 U.S. at 106-107. Before addressing the merits of the plaintiffs' claims, the Court noted its discovery at oral argument that "the named [plaintiffs] ha[d] been convicted," thus ending their pretrial detention. *Id.* at 110 n.11. The Court determined, however, that the plaintiffs' challenge belonged "to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Ibid.* Although "the record d[id] not indicate whether any of [the plaintiffs] were still in custody awaiting trial when the District Court certified the class," the case was "suitable" for application of relation-back principles, because the inherently short duration of pretrial custody rendered it

"by no means certain that any given individual, named as a plaintiff, would be in pretrial custody long enough for a district judge to certify the class." *Ibid.* (citing *Sosna*, 419 U.S. at 402 n.11). The Court also noted "the constant existence of a class of persons suffering the deprivation," as well as the plaintiffs' attorney, a public defender, who "has other clients with a continuing live interest in the case." *Ibid.*

Following *Gerstein*, the Court has continued to apply relation-back principles in cases involving claims "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *McLaughlin*, 500 U.S. at 52 (citing *Gerstein*, 420 U.S. at 110 n.11). For instance, *McLaughlin* involved a class action challenging the county's failure to provide arrestees with a prompt probable-cause hearing. *Id.* at 48. Although "the class was not certified until after the named plaintiffs' claims had become moot," the "'relation back' doctrine [was] properly invoked to preserve the merits of the case for judicial resolution." *Id.* at 52 (citing *Sosna*, 419 U.S. at 402 n.11); see *Swisher* v. *Brady*, 438 U.S. 204, 213 n.11 (1978) (applying relation-back doctrine to Fifth Amendment challenge to juvenile court proceedings); see also *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 75-77 (2013) (describing application of relation-back doctrine to "inherently transitory" claims).

b. The Ninth Circuit recognized that this case was not brought as a class action (or even as a civil suit). See Pet. App. 14a. The court nevertheless determined that it could treat the case as a "[f]unctional class action[]" based on the presence of "the same three features" discussed in *Gerstein*: (1) a challenge to "broader policies,"

rather than "individual violations"; (2) an "inherently transitory" claim, which produces a "continually changing group[] of injured individuals who would benefit from any relief"; and (3) "common representation." *Ibid.* The Ninth Circuit considered those features, in combination with its view that "this is a supervisory mandamus case," as sufficient to overcome the mootness of respondents' own claims. *Id.* at 15a. And it viewed any focus on the absence of a "formal" class action as "misplaced." *Ibid.*

The Ninth Circuit erred in viewing *Gerstein* as support for its novel and legally unsupported notion of a "functional class action." As the foregoing discussion makes clear, *Gerstein* rests on an application of relation-back principles, under which the grant of a class-certification motion under Rule 23 may be deemed to relate back to the filing of the complaint. See *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 407 n.11 (1980) ("The 'relation back' principle [is] a traditional equitable doctrine [that was] applied to class certification claims in *Gerstein*."). Application of those principles, first identified as a possibility in *Sosna* (upon which *Gerstein* relied), expressly depends on "the fact that a putative class acquires an independent legal status once it is certified under Rule 23." *Genesis Healthcare*, 569 U.S. at 75. Those principles do not apply where, as here, the plaintiffs have sought relief solely in their individual capacities.

A focus on class status is therefore not "misplaced," Pet. App. 15a, but is instead critical, in the mootness analysis. "The class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."

General Tel. Co. v. *Falcon*, 457 U.S. 147, 155 (1982) (citation and internal quotation marks omitted). But "it is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot." *Kremens* v. *Bartley*, 431 U.S. 119, 132-133 (1977) (citation omitted). Certification represents a judicial determination that injured parties other than the named plaintiff exist. *Sosna*, 419 U.S. at 399. And it provides a definition by which injured parties can be identified, which "is especially important in cases" in which "the litigation is likely to become moot as to the initially named [challengers] prior to the exhaustion of appellate review." *Board of Sch. Comm'rs* v. *Jacobs*, 420 U.S. 128, 130 (1975) (per curiam). Certification also ensures that class members will be bound by the outcome, *Smith* v. *Bayer Corp.*, 564 U.S. 299, 315 (2011), and that the action will not be settled or dismissed without appropriate notice, see Fed. R. Civ. P. 23(e). The Ninth Circuit's "functional class action" device, in contrast, serves no such functions and provides no such assurances.

Contrary to the Ninth Circuit's suggestion (Pet. App. 14a), *Gerstein*'s observation about the "inherently transitory" nature of the claims at issue there does not provide a license for courts to avoid mootness concerns by supplementing Federal Rule of Civil Procedure 23 with informal class-action analogues of their own creation. The Court in *Gerstein* recognized that "avoid[ing] mootness under *Sosna*" would "ordinarily * * * require[]" a "showing" of a live controversy as to at least one named plaintiff at the time of class certification. 420 U.S. at 110 n.11. But it deemed the situation in *Gerstein* to present "a suitable exception to that requirement," *ibid.*, citing *Sosna*'s suggestion that the relation-back

doctrine is most appropriately applied where "otherwise the issue would evade review" because the named plaintiffs' claims are so transitory in nature that the controversy is likely to "become[] moot as to them before the district court can reasonably be expected to rule on a certification motion." *Sosna*, 419 U.S. at 402 n.11; see *Gerstein*, 420 U.S. at 110 n.11 (citing *Sosna*, 419 U.S. at 402 n.11). In identifying the transient nature of the plaintiffs' claims as a reason for applying relation-back principles to class certification, the Court never suggested that transience alone was a permissible *substitute* for class certification.

A properly certified class—with its own independent legal status—was present not only in *Gerstein* itself, but in every decision in which this Court has relied on the "inherently transitory" nature of a claim as a reason to adjudicate the merits notwithstanding mootness as to the plaintiff. *McLaughlin*, 500 U.S. at 52 (quoting *Geraghty*, 445 U.S. at 399); see *Schall* v. *Martin*, 467 U.S. 253, 256 n.3 (1984); *Swisher*, 438 U.S. at 213 n.11. Conversely, in cases in which class certification was denied, or was granted but later invalidated, the lack of a properly certified class has required dismissal when the named party's personal stake in the matter expired. See *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 430 (1976); *Jacobs*, 420 U.S. at 129 (finding case moot due to "inadequate compliance with the requirements of Rule 23(c)"); see also *Geraghty*, 445 U.S. at 404 (observing that a case "must be dismissed as moot" upon appellate determination "that class certification properly was denied").

c. The Ninth Circuit's notion of a "functional class action" is particularly difficult to square with *Pasadena City Board of Education* v. *Spangler*, *supra*. In that

case, a public school board that had been involved in litigation with students and the United States over its segregation-related policies sought appellate review of the district court's denial of leave to modify its desegregation plan. 427 U.S. at 427-429. Before addressing the merits, the Court noted the concern that the case had become moot when "all the original student plaintiffs * * * graduated from the Pasadena school system." *Id.* at 430. Because the district court had "never certified" the case as a class action under Rule 23, the Court explained, the case "would clearly be moot" without the involvement of the United States. *Ibid.* The Court rejected the contention that, because the litigation had been "filed as a class action" and the parties had "treated" it as a class action, Rule 23 certification was an unnecessary "'verbal recital.'" *Ibid.* The Court explained that, "while counsel may wish to represent a class of unnamed individuals still attending the Pasadena public schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation." *Ibid.*

The same considerations that led the Court in *Spangler* to say that the case "would clearly be moot" without the United States are present here. 427 U.S. at 430. Here, as there, the individual challengers' interests in the outcome of the litigation have expired, and "there has been no certification" of a class with its own independent interest. *Ibid.* Respondents assert that their "functional class action" has certain useful features: a challenge not only to "individual violations, but also broader policies or practices"; a "continually changing group[] of injured individuals"; and "common representation." Br. in Opp. 19-20 (citation omitted). Yet the

same was true in *Spangler*, where mootness was avoided only by the presence of another challenger (the United States) with a continuing interest of its own. Because no such challenger exists here, respondents' claims should have been dismissed as moot.

3. The exception to mootness for cases "capable of repetition, yet evading review" does not apply to respondents' claims

At the certiorari stage, respondents argued that their cases fall under the exception to mootness for "disputes that are capable of repetition while evading review." Br. in Opp. 17 (citation and internal quotation marks omitted). The court of appeals correctly rejected that argument, Pet. App. 12a, which cannot be squared with this Court's precedents.

This Court has explained that "in the absence of a class action, the 'capable of repetition, yet evading review' doctrine [i]s limited to the situation where two elements [are] combined: (1) the challenged action [i]s in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [i]s a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (citation omitted). Respondents cannot meet the second requirement, because they cannot demonstrate a "reasonable expectation" that they will *themselves* be subject to a future prosecution in the Southern District in which the security policy will again be applied to them. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102-103 (1983).

Respondents contend (Br. in Opp. 18) that a future recurrence of the dispute is reasonably likely because two of them, Sanchez-Gomez and Patricio-Guzman, have

already "[r]eturn[ed] to the Southern District of California on new criminal charges," where they "were again subjected to unwarranted shackling." Respondents also note (*ibid.*) that the new charges (illegal reentry in both cases) are "not unusual for individuals who reenter the United States after removal." Respondents assert, therefore, that yet another prosecution in the Southern District is equally "as likely" as the recurrence of other disputes that this Court has adjudicated under the capable-of-repetition-yet-evading-review exception. *Id.* at 19 (citing *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969 (2016); *Turner* v. *Rogers*, 564 U.S. 431 (2011); *Press-Enter. Co.* v. *Superior Court*, 478 U.S. 1 (1986); *Roe* v. *Wade*, 410 U.S. 113 (1973)).

This Court's decisions make clear, however, that a party's avowed commitment to criminal recidivism is not a sufficient basis for maintaining his challenge on a matter of criminal procedure. In *O'Shea* v. *Littleton*, 414 U.S. 488 (1973), the Court declined to adjudicate on the merits the constitutional claims of plaintiffs who sought injunctive relief barring the discriminatory execution of certain criminal procedures (such as the setting of pretrial bonds). *Id.* at 491-492. The Court noted that the plaintiffs' "prospect of future injury rests on the likelihood that [they] will again be arrested for and charged with violations of the criminal law and will again be subjected to" the challenged practices. *Id.* at 496. Observing that the plaintiffs did not dispute that "the statutes that might possibly be enforced against" them (*i.e.*, the substantive criminal laws) were valid, the Court rejected their argument: "that *if* [the plaintiffs] proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings,

* * * they will be subjected to the discriminatory practices." *Id.* at 496-497. Even accepting that the plaintiffs were "deeply" committed to eradicating those practices, the Court was unwilling to rest jurisdiction on the notion "that [the plaintiffs] will be prosecuted for violating valid criminal laws." *Id.* at 497. Rather, the Court felt bound to "assume that [the plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction." *Ibid.*

The Court's decisions following *O'Shea* "reveal that, for purposes of assessing the likelihood that state authorities will reinflict a given injury, [the Court] generally ha[s] been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." *Honig* v. *Doe*, 484 U.S. 305, 320 (1988) (citing *O'Shea*). Thus, in *Lane* v. *Williams*, 455 U.S. 624 (1982), the Court dismissed as moot a suit brought by prisoners who objected to the trial court's failure to inform them, at the time of their guilty pleas, of a mandatory parole term (which they later violated). The case was moot, the Court explained, because the objected-to parole term had "expired of its own accord" during the litigation. *Id.* at 631. The Court rejected a dissenter's argument that the prisoners could maintain their suit because they might again commit a crime, at which point their parole violation would be held against them in a future parole proceeding. See *id.* at 632 n.13. "The parole violations," the Court explained, "cannot affect a subsequent parole determination unless [the prisoners] again violate state law, are returned to prison, and become eligible for parole. [The prisoners] themselves are able—and indeed required by law—to prevent such a possibility from occurring." *Ibid.*

Similarly, in *Spencer* v. *Kemna*, 523 U.S. 1 (1998), the Court refused to consider the claims of a prisoner who objected to an order revoking his parole, because the prisoner had been released from prison before his challenge was adjudicated. Even though the prisoner was later rearrested on separate charges, *id.* at 14, the Court declined to accept his argument that "the Order of Revocation could be used to increase his sentence in a future sentencing proceeding" as a basis for continuing his suit. *Id.* at 15. That argument, the Court explained, was "contingent upon [his] violating the law, getting caught, and being convicted." *Ibid.*; see *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam) (declining, "in the absence of a class action," to apply mootness exception where plaintiff was no longer subject to challenged parole procedures).

None of the cases cited by respondents, all of which arise outside the criminal context, undermines the principle that a litigant may not establish a "reasonable expectation" that a dispute will recur, for purposes of the capable-of-repetition-yet-evading-review exception, by arguing that he is likely in the future to violate a lawful criminal statute. See *Kingdomware Techs.*, 136 S. Ct. at 1975-1976 (company likely to bid for future procurement contracts); *Turner*, 564 U.S. at 440 (litigant with substantial child-support debts and no ability to pay likely to face civil contempt); *Press-Enter.*, 478 U.S. at 6 (media company likely to report on future court cases); *Roe*, 410 U.S. at 125 (female litigant likely to have future pregnancy). The Ninth Circuit was therefore correct in declining to "presume that [respondents] will be subject to criminal proceedings in the future," whether in the Southern District of California or elsewhere. Pet. App. 12a.

CONCLUSION

The decision below should be vacated.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOHN P. CRONAN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC J. FEIGIN
ALLON KEDEM
Assistants to the Solicitor General
DAVID B. GOODHAND
Attorney

JANUARY 2018